

FORTUNE

COVER STORY

Why the Disabilities Act Exasperates Entrepreneurs

They support the law's aims but find it vaguely written and hard to comply with.

FORTUNE SMALL BUSINESS

Sunday, May 1, 2005

By Justin Martin

A young man with cerebral palsy went out for breakfast at the Blue Plate Café in Memphis. He arrived in a wheelchair, accompanied by a service dog to help him with tasks such as opening doors. The restaurant was crowded, so owner Mike Richmond says he made a decision: Because eight people came with the man and were available to help him, the dog would not be allowed into the dining area. The party then left. Not long afterward, in June 2004, Richmond was served with a lawsuit under the federal Americans With Disabilities Act. To head off a legal battle, he quickly settled. He agreed to pay \$3,500 in damages to the man, as well as legal fees and a \$1,000 fine. "I was shocked," says Richmond. "But with some of these ADA lawsuits, you don't even know the rules until you get hit."

Dave Mock was hit too—and harder. The owner of Mock Bros., a saddle maker in Yucca Valley, Calif., was sued for several alleged ADA violations, including a counter that was too high to be accessible for disabled customers. When lawyers' fees hit \$27,000, Mock settled and paid \$4,000 in damages. But that wasn't the end of it. To address his ADA violations, he would have to make at least another \$20,000 in renovations. Instead he shut down his store this past December and sold the property. The great irony: Mock Bros. was founded in 1941 by Archie Mock, Dave's uncle, a paraplegic who is now deceased. Closing the family business, Dave says quietly, "was just devastating."

The ADA, which turns 15 this year, has literally broken down barriers for Americans with disabilities. Most small-business owners say they want to comply. But many also believe that the law's requirements are growing vaguer and more onerous. The two primary federal agencies that oversee the law—the U.S. Department of Justice and the Equal Employment Opportunity Commission—don't do any policing. This might seem like good news to those who hate government regulation, but there's a downside. With no inspectors making the

rounds of small businesses to issue warnings to those that aren't complying, it's up to entrepreneurs to stay abreast of how the broadly written statute is interpreted in courts around the country.

Those who don't keep up risk getting sued—and even if they win in court, they often lose time and legal fees and suffer damage to their reputation. While the ADA is quite specific on some requirements, there are a lot of gray areas. The law contains many detailed rules related to access to public spaces such as stores and restaurants. For instance, doorways must have openings at least 32 inches wide. Such guidelines apply even to businesses operated by one person. But the rules about access are less stringent for older buildings than for those built after 1992. How much less stringent is a matter of interpretation.

The ADA also covers discrimination against employees with disabilities, an equally fraught issue for employers. If a small business fails to hire a qualified job applicant who is deaf or copes with diabetes, it faces a potential lawsuit. The same goes for a company that fires or downgrades the job duties of a disabled person. But this part of the law differs from the one governing access because it applies to any company with 15 or more workers.

Small businesses are supposedly held to lower standards than large corporations and are required only to comply with the ADA in ways that are "readily achievable." But that term is defined on a case-by-case basis. "It's really difficult for a small business to keep up with all the rules and regulations" and court decisions, says William Anthony, a Florida State University management professor and expert on the ADA.

The law even extends to psychiatric conditions. Fire a poor performer who happens to be depressed, and that employee may be able to sue, arguing that his condition is a disability. For such a case to hold up, the plaintiff needs to have a diagnosed condition and an employer must

know about it. But ADA lawsuits stemming from psychiatric conditions are notoriously murky.

Consider the case of Audrey Jacques, an employee with bipolar disorder who worked for DiMarzio, a maker of electric-guitar components based in New York City. DiMarzio alleged that Jacques was extremely confrontational with co-workers and supervisors. Though Jacques denied that allegation, DiMarzio fired her. Because she had a diagnosed condition and said her employer was aware of it, Jacques was able to sue. She won in federal district court. DiMarzio was ordered to pay \$50,000 in damages for emotional distress and \$140,000 in back pay. When DiMarzio appealed, the decision was reversed. Both parties dropped the case in February.

Such legal flip-flopping highlights the complexity of psychiatric disability cases under the ADA. Was Jacques merely a bad employee? Was her condition to blame? What obligation did DiMarzio have to keep employing her if she caused disruption? Such questions continue to play out in the courts.

Meanwhile, the number of ADA suits—over physical and mental disability, handicapped access, etc.—continues to rise, although that isn't obvious from looking at the federal statistics. The EEOC received 15,376 ADA complaints in 2004. That's nearly identical to the 2003 number: 15,377. But according to legal experts, an increasing number of cases are being filed in state courts.

All the states have their own statutes, so-called mini-ADAs. A small business must keep track of both federal and state laws, which don't always agree. State laws are often stricter, particularly in places such as Illinois that have a history of heavy workplace regulation. Many states also lack caps for certain types of damages. In federal employment-discrimination cases, the cap on compensatory and punitive damages is \$50,000 for a firm with fewer than 100 employees. But the limits are higher, even nonexistent, in states such as New Jersey and Massachusetts.

Of particular concern for small businesses are so-called frequent filers—disabled customers who go from establishment to establishment, uncovering alleged ADA violations and filing suits. Sometimes the motive is to attract publicity for the needs of the disabled. But some frequent filers are just looking to make a quick buck, say critics. Because it's so expensive to pursue a court battle, many small businesses simply settle.

George Leage owns three restaurants in Morro Bay, Calif., which were sued in rapid succession by frequent filer Jarek Molski. Leage says he has credit card slips that show that Molski visited his Harbor Hut restaurant at 4:20 p.m. on June 16, 2003, then dropped by the Great American Fish Company at 6:27 p.m. Two weeks later Molski went to Leage's other eatery, the Outrigger. Molski, who uses a wheelchair, filed suits against all three restaurants, citing ADA violations in their

bathrooms. He alleged that he injured himself—not once, but in each of the three bathrooms.

It turns out that Molski, 34, is notorious for filing hundreds of ADA suits throughout California. A federal judge recently deemed him a "vexatious litigant" responsible for a "scheme of systematic extortion." Molski was slapped with an order that—if upheld on appeal—will prevent him from filing in federal court without first getting the approval of a judge. But Leage will still have to face Molski in state court. The case against the Outrigger recently settled for \$18,000; a court battle would have rung up thousands in lawyers' fees. "I'm willing to do whatever I can to abide by the law," says Leage, "but this is nothing but a moneymaking scam." (Molski and his attorney did not respond to telegrams seeking comment.) Congressman Mark Foley (R-Florida) is sponsoring a law to slow down frequent filers. It would give a business 90 days to rectify an ADA complaint before a lawsuit could proceed. Foley plans to reintroduce the six-year-old proposal later this year.

For many small-business owners, the most troublesome part of the ADA is the "readily achievable" standard. What that means is anyone's guess. Say a small business can't easily afford a wheelchair-accessible desk for an employee. Instead, a standard-issue desk is put up on blocks. If such an accommodation satisfies the employee, it means no problem, no lawsuit. Meanwhile, there are stories of frequent filers, armed with measuring tapes, going from business to business, filing lawsuits whenever a handgrip is an inch too high, a parking space an inch too narrow. "It's very situational. If someone wants to sue you under the ADA, there's often a way to be found," says Karen Harned, executive director of the National Federation of Independent Business Legal Foundation.

But if there is one clear rule about the ADA, it is this: Doing something trumps doing nothing. If a small business gets sued, any steps it took to accommodate the disabled can weigh heavily with jurors. Potential litigants are also less likely to sue a business that makes an effort, however simple and inexpensive. A retailer might advertise that its website is available to take orders from disabled shoppers. Or a worker who is groggy in the morning from medication might be allowed to arrive later and stay later.

A few years ago, a wave of ADA lawsuits were filed in the historic South Side district of Pittsburgh. Yet [City Theatre](#) has avoided trouble by taking such actions as printing programs in Braille. "There are many small steps you can take that send a message to the disabled community that you are open to change," says Diane Nutting, City Theatre's education director. That's a good message, and given that disabled Americans spend an estimated \$796 billion a year, it's also good business.

With reporting by Matthew Phan